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No. 84-818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD RUDI,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether petitioner has failed to present a substantial federal question where, consistent with well-established precedent of this Court, the Illinois Supreme Court held that he was not placed in jeopardy by a sham trial conducted solely to effectuate an unauthorized dismissal for want of prosecution?

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully in the agrument contained herein, respondent does not believe that petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Facts necessary for an understanding of the issues raised by the petition are adequately set forth in petitioner's Statement of the Case. Respondent would additionally note, however, that the People did seek and were granted a late notice of appeal from the trial court's April 13, 1982, order. *See* Appellant's Brief, Appendix A, filed in *People v. Rudi*, Nos. 82-516 and 82-560 Cons. (Appellate Court of Illinois, Second Judicial District).

REASONS FOR DENIAL OF THE WRIT

PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE, CONSISTENT WITH WELL-ESTABLISHED PRECEDENT OF THIS COURT, THE ILLINOIS SUPREME COURT HELD THAT HE WAS NOT PLACED IN JEOPARDY BY A SHAM TRIAL CONDUCTED SOLELY TO EFFECTUATE AN UNAUTHORIZED DISMISSAL FOR WANT OF PROSECUTION.

Contrary to petitioner's assertion (Petition at 16, 17), the Illinois Supreme Court did not reject his double jeopardy claim merely because the trial court made "erroneous" rulings terminating his prosecution. Rather, relying primarily on this Court's decision in *Serfass v. United States*, 420 U.S. 377 (1975), and its own ruling in *People v. Deems*, 81 Ill. 2d 384, 410 N.E.2d 28 (1980), *cert. denied*, 450 U.S. 925 (1981), the Court correctly held that petitioner was not placed in jeopardy on April 13, 1982, because no proceeding presenting a risk of determination of guilt was ever initiated against him.

On the original date set for petitioner's trial, the People moved for a two (2) day continuance because the assistant state's attorney had been misinformed of the trial date by the clerk's office and was unable to immediately secure the attendance of state's witnesses. (C. 163-65, 413, 414) After the court denied the continuance, the People moved to *nolle prosequi* the charge. (C. 415, 419) This motion was also denied and, over the People's objection, the court ordered that the cause proceed to trial because in its view the State had not shown due diligence in becoming informed of the correct trial date. (C. 415, 418, 419, 434) Without first ascertaining on the record whether petitioner waived a jury trial,* the judge administered an oath to petitioner and entered an order of acquittal. (C. 169, 419) The Illinois Supreme Court held that under the circumstances of this case, the trial court had abused its discretion in denying the State's motion to *nolle pros. People v. Rudi*, ... Ill. 2d ....., 469 N.E.2d 580, 582 (1984). Accordingly, under Illinois law the court lacked jurisdiction to proceed with a trial and acquit petitioner. *See People ex rel. Castle v. Daniels*, 8 Ill. 2d 43, 132 N.E.2d 507 (1956); *People ex rel. Elliot v. Covelli*, 415 Ill. 79, 112 N.E.2d 156 (1953); *c.f. People v. Young*, 60 Ill. App. 3d 49, 376 N.E.2d 712 (2nd Dist. 1978) (where trial court should have granted State's motion for leave to file notice of appeal, subsequent orders void).

It is true, as petitioner notes, that this Court in *Sanabria v. United States*, 437 U.S. 54 (1978), held an "acquittal" to be a resolution in a defendant's favor, correct or not, of some or all of the factual elements of the of-

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* A jury trial had been scheduled (C. 156). Although a written jury waiver is included in the Common Law Record, it was time-stamped 10:30 p.m. April 13th, 1982 (C.R. 167), apparently after the trial court "acquitted" petitioner.

fense charged. It is also beyond dispute, however, that the concept of acquittal has no significance in a double jeopardy context "unless jeopardy has once attached and an accused has been subjected to the risk of conviction." *Serfass, supra,* 420 U.S. at 392. In *Serfass,* this Court found that the grant of the defendant's motion to dismiss the indictment could not have constituted an acquittal because at no time during or following the hearing on the motion did the trial court have jurisdiction to make any determination regarding the defendant's guilt or innocence. Similarly, the judge in the present case was without power to call the case for trial and purport to acquit petitioner. *Compare Goolsby v. Hutto,* 529 F. Supp. 92, 96 (E.D. Vir. 1981), *aff'd,* 691 F.2d 199 (4th Cir. 1982); *United States v. Dahlstrum,* 655 F.2d 971 (9th Cir. 1981).

Moreover, at no time could petitioner have even perceived a danger of being found guilty of any offense inasmuch as the State refused to participate in the proceedings, only he was sworn as a witness, and no evidence at all was adduced. As the Illinois Supreme Court recognized, the underlying principle of the guarantee against double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States,* 355 U.S. 184, 187, 188 (1957). Far from attempting to convict petitioner, the State here was seeking in good faith to prevent the case from proceeding to trial. Nor could it possibly be said that the court's judgment "actually represent[ed] a resolution [in petitioner's favor], correct or not, of some or all of

the factual elements of the offense charged." *United States v. Scott*, 437 U.S. 82, 97 (1978) [quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)]. The sole purpose of this sham trial was to effectuate an unauthorized dismissal for want of prosecution, not to try the question of petitioner's actual guilt or innocence. Accordingly, the interests protected by the double jeopardy clause are simply not implicated. To the extent that the fourth circuit held otherwise in *Goolsby, supra*, its decision is clearly at odds with well-established precedent of this Court.

CONCLUSION

For the reasons heretofore stated, respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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